No. 2859

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHIN AH YOKE, alias JANE DOE,
Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco,

In the Matter of CHIN AH YOKE, alias JANE DOE on Habeas Corpus,
Appellee.

Brief for Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION.

GEO. A. McGOWAN,
Attorney for Appellant.
Bank of Italy Building,
San Francisco, California.

Filed this.....day of March, 1917.
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STATEMENT OF THE CASE.

This case comes upon appeal before this court from the judgment of the District Court in denying the petition for a writ of Habeas Corpus wherein it was sought to have the lower court set aside the warrant of deportation against the appellant herein, issued by the Secretary of Labor, wherein he charges that the appellant is an alien who has been found practicing prostitution since her entry into the United States, while the appellant claims that she is not an

alien but is a native-born citizen of the United States and that she has always resided therein and has never absented herself therefrom, and hence the Secretary of Labor is without jurisdiction over her.

It appears from the record that on the morning of September 1st, 1915, this appellant, Chin Ah Yoke, was taken into custody, together with a Chinese man, Wong Him Sing, in whose company she was practically found, by a raiding party of police officers, Mission representatives, and an Immigration officer, in the Mon Ming Hotel, a Chinese Hostelry in the Chinatown District of San Francisco.

A telegram was sent by the Commissioner of Immigration at San Francisco to the Secretary of Labor at Washington, requesting the issuance of a warrant of arrest against this appellant under the name of Jane Doe, charging her as an alien who had landed at an unknown port, on or about the 1st day of July, 1915, and that she was a prostitute and had been found practicing prostitution subsequent to her entry into the United States. The warrant was issued as requested on September 2nd, 1915 (Tr. 31-32.)

The formal application for the said warrant of arrest is in part as follows:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

Alien found in compromising surroundings with a

man. Both detained. Man later released when landing was verified, as son of Native. Man stated to Inspector Robinson that woman was a prostitute. Alien as yet refuses to talk. It is believed that she may be Gum Chi, *alias* Bow Heung, number 53210/76, dated June 17, 1911.

(2) The present location and occupation of above-named alien are as follows: At this Station.

After the apprehension of the appellant and Wong Him Sing, on September 1, 1915, they were taken together from San Francisco to the Immigration station at Angel Island. It appears from the affidavit of appellant "That at the time of the arrest of your affiant in San Francisco on September 1st, she had never had any previous experience with the Immigration officials, but that arrested at the same time with her was a Chinese man who claimed to have had experience with criminal matters, who advised and told your affiant that she should not give any information about herself, about who or what she was, until an attorney could come and see her and talk to her, and that this privilege would have to be accorded me."

Upon arriving at the Immigration Station Wong Him Sing was subjected to an examination (Tr. 35-43) in which he speaks of the appellant having visited his room and denies any immoral relations, though admits that she had previously visited his room. With respect to his own *experience with criminal matters* the following appears. (Tr. 40-41.)

"Q. Did you ever have any difficulty with

the police authorities in Los Angeles? A. Yes.

Q. What was it?

A. There were some Chinese smuggled from Mexico and they went into my restaurant in Los Angeles for hiding, and afterward I accompanied them on an auto stage. I was in the same stage to go to some suburb of Los Angeles and I was taken in custody with the crowd and I found that I had no money at that time and pleaded guilty and I was sentenced to ten months in prison for that trouble.

Q. Did you serve your time? A. Yes.

Q. In the city prison, Los Angeles? A. Yes.

Q. When were you released?

A. First month of this year (about February)."

and again in his examination on the following day, September 2nd, 1915, the following appears:

(Tr. 46)

"Q. Were you ever in Calexico?

A. Yes, I got pinched once there.

Q. What was the name of your restaurant there?

A. Calexico Cafe."

(Tr. 47)

"Q. Before when you have trouble, did you meet custom-house men because you smuggled opium?

A. Never.

Q. Never got in trouble smuggling opium?

A. No.

Q. What did you get in trouble for?

A. Just smuggled Chinamen.

Q. How long have you been engaged in smuggling Chinamen?

A. About two years ago I got arrested.

Q. How long before that first time you started to smuggle Chinese?

A. I, no smuggled Chinamen. Me and another Chinaman on the train and they said we smuggle Chinamen.

Q. You pleaded guilty.

A. I got no money; cost $1000 for lawyer. No got so much money. My friend tell me better say guilty. I stayed in jail long time. Pretty near one year."

At the conclusion of the examination of Wong Him Sing this appellant was brought before the Immigration Inspector and he attempted to conduct an examination of her. To appreciate what took place at this examination let us revert back to the advice given the appellant by Wong Him Sing who had had experience with criminal matters (Tr. 57)

> "That she should not give any information about herself or who or what she was until an attorney could come and see her and talk to her and that this privilege would have to be accorded * * * * "

and let us further note how in her stress she acted upon the advice given her (Tr. 57)

"It was for that reason, because I had no advice, and was unable to communicate with others, and others could not communicate with me, that I refused to make any statement at all to the Immigration officials with respect to myself. That if I had been permitted counsel to advise me, or if my friends had been allowed to communicate with me, I would have given true, full and correct information about myself. That I was kept at the Immigration Station from the time of my apprehension on September 1st for a period of three weeks before released on custody, and during that time I was not permitted to see or interview anyone, nor was any attorney permitted to see me."

The attempted examination of appellant follows:

(Tr. 44)

"Q. What is your name?

A. I don't want to tell you my name.

Q. You are informed that your refusal to divulge your real name, or answer any questions which may be asked of you at this time, will only serve to prolong your detention and the ultimate bringing to a close of your case. (No answer.

Q. Where were you born? A. (No answer.)

Q. How old are you? A. Don't know.

Q. When did you come to the United States?

A. I was born in the United States.

Q. Have you any documentary evidence to

show that?

A. I have not here. It is is with my attorneys.

Q. Where are your parents?

A. I don't want to tell you anything about them.

Q. How do you expect to leave this station unless you furnish us (39) with information to satisfy us that you are entitled to remain in the United States, you being of the Chinese race?

A. Don't care; I don't want to tell you anything.

Q. Do you realize that you will be held at this station until you make the proper statement to show your right to be in the United States?

A. I don't see why you could deport me, or why I cannot stay in this country.

Q. If you show us the evidence or give us the information to substantiate your claim that you are native born, this office has no reason to detain you any longer. (Refuses to answer.)

On September 2nd, 1915, Wong Him Sing was re-examined as to the identity of the appellant:

(Tr. 45)

"Q. I will ask you again what is her family name?

A. I don't know her family name.

Q. Did you ever hear her referred to as Gum Chi? A. I never heard that.

Q. Did you ever hear her referred to as Bow Heung? A. I don't know that.

Q. You told me you were going to tell me the truth.

A. I don't know.

Wong Him Sing was released and permitted to go his way at the conclusion of this examination.

On September 4th, 1915, the formal application for the warrant of arrest was made out and contained the following:

(Tr. 33)

"Alien found in compromising surroundings with a man. Both detained. Man later released when landing was verified, as son of Native. Man stated to Inspector Robinson that woman was a prostitute. Alien as yet refused to talk. It is believed that she may be Gum Chi, alias Bow Heung, warrant numbered 53210-76, dated June 17, 1911."

At some time between September 1st and 6th, the appellant was taken to the Presbyterian Mission, and on September 7th was noted what there transpired.

(Tr. 51)

"NOTE: This alien was taken to Miss Cameron's Mission the other day by Inspector Robinson of this Service and two of the girls under Miss Cameron's care, formerly inmates of houses of prostitution, identified this girl, one stating that she was Gum Chi, the other one stating that she was Bow Heung. Warrants of arrest have been issued for a certain Gum Chi with the *alias* Bow Heung, and it is my under-

standing these girls stated that the girl now under arrest was an inmate of a house of prostitution at 12 Portola Alley. If this information is correct it is evident that she is a girl reported to this office some time ago as having been smuggled into this country from the steamer 'Manchuria.' An investigation along that line is now being made inasmuch as the alien refuses to give any information concerning her nativity."

On September 7th the appellant was again re-examined, and she still adhered in the main to the advice given her by Wong Him Sing (Tr. 56-57) and refused to give information concerning herself, though she did in substance give considerable more information about herself than upon her first examination.

(Tr. 48-49)

"Q. What is your name?

A. My name is Ah Yoke.

Q. What is your family name?

A. I am not willing to give you my family name at the present time. I am waiting for my attorney's advice.

Q. How old are you?

A. I know my age but I won't tell you.

Q. Where were you born?

A. Born in this country.

Q. Have you any documentary evidence to support that statement? A. Not with me.

Q. Where were you born?

A. I don't wish to tell you just now where I

was born.

Q. Is it not a fact that you were born in China?

A. No, in the United States.

Q. Were you ever on board the steamer 'Manchuria' at any time?

A. I don't know that boat.

Q. Were you ever known under the name of Bow Heung? A. No.

Q. Were you ever known by the name of Gum Chi? A. No.

Q. Did you ever live in a building at 12 Portola Alley at any time? A. No, I never lived there.

Q. Where do you reside?

A. I am not going to give you that information yet.

Q. How long have you resided in the hotel where you were apprehended? A. Two nights.

Q. Are you married? A. No.

Q. How do you support yourself?

A. My father and mother support me. (43)

Q. Where are your parents?

A. I don't wish to state that just now.

Q. What are the names of your parents?

A. I don't wish to tell you about my father and mother. He knows all about my trouble.

Q. Who knows all about your trouble?

A. He knows that I am here—my father.

Q. How do you know that your father is aware that you are being detained here?

A. Because he is inquiring about me and people must have told him I was arrested.

Q. Have you made any trips to China? A. No.

The appellant was from September 1st, 1915, held in custody incommunicado, and the right of counsel withheld until the conclusion of the examination held on September 20, 1915, wherein the appellant testified about herself as follows:

(Tr. 52)

"Q. What is your name? A. Ah Yoke.

Q. What is your family name?

A. I don't know my family name.

Q. How old are you? A. 20.

Q. Where were you born?

A. I don't know; I was born in the United States.

(Tr. 53)

"Q. Inasmuch as you claim nativity have you any documentary evidence to produce to support that statement?

A. I have no records or papers to show, but they are with my parents.

Q. What are the names of your parents?

A. My father has a name, but I will not give it to you.

Q. What is the name of your mother?

A. Her name is Lee Shee, but she is dead.

Q. Where did she die?

A. I was 4 or 5 years old.

Q. Where did she die? A. In this country.

Q. Have you any brothers or sisters?

A. None."

(Tr. 55)

"Q. You are now brought before me, an immigrant inspector, to give you an opportunity to show cause, if you have any, why you should not be deported in conformity with law.

A. I can give you no other reason except I was born here.

Q. You are further notified that you have the privilege of inspecting the warrant of arrest and all the evidence upon which it was issued.

A. I don't want to see it.

Q. You are further notified that you have the privilege of employing counsel. Do you wish to avail yourself of that privilege?

A. My case is taken care of by my father.

Q. Dou you wish to employ counsel to represent you in any further hearing in this case?

A. I leave that to my father. He can hire an attorney for me.

Q. Your attorney, no doubt, will make the necessary arrangements for your release under bond in the sum of $1,000, that being permitted under the terms of the warrant, when we were satisfied as to your identity. A. All right."

At this hearing on September 20th, 1915, the appellant was confronted with a landing record of a Chinese woman by the name of Wong Ah Muy, who had arrived at the port of San Francisco on the Shin-

yo Maru, October 7th, 1912, and had been permitted to enter the United States as the wife of a native born citizen of the United States. The appellant claims she is not that person and the Immigration authorities claimed from that hearing on September 20th, 1915, that she was. (Tr. 52-53-54.)

This appellant was arrested on September 1st, 1915, and was held in close custody, incommunicado in fact, and without the right of counsel from that day on until after the hearing on September 20th, 1915, had concluded.

Upon being given an opportunity to present her defense to the charges brought against her the appellant caused to be submitted her affidavit (Tr. 56-57-58), the affidavit of Chin Duck Quong, her father, (Tr. 58-59-60*), the affidavit of Ho Shee, the Chinese lady who had cared for her after the death of her mother, and had raised her (Tr. 60-61-62), the affidavit of Chin Shee, a Chinese lady who had known the affiant since her birth in this country (Tr. 62-63) and lastly the affidavit of Chin Pok, who had known the affiant here in this country since she was a baby 2 or 3 years of age (Tr. 64-65). The foregoing affidavits attest the birth of the appellant within the United States and her subsequent life therein showing it to be impossible that she could be the Wong Ah Muy, as contended by the Immigration authorities, and claiming and contending that a mistake of identification had been made.

The communication submitting the foregoing affidavits, all of which were sworn to on December 20,

1915, is as follows:

(Tr. 65-66-67)

Department No. 54012-116.

"In accordance with the provisions of the Immigration Rules and Regulations there is submitted herewith the testimony, affidavits and counter-showing made upon behalf of Chin Ah Yoke, arrested herein as Jane Doe.'

PROTESTS AND EXCEPTIONS.

The Immigration Rules and Regulations provide that the Protest and Exceptions should not encumber the record, but should be embodied in a separate written communication. We desire to protest against the taking of the detained into custody on the 1st day of September, 1915, and held incommunicado, and not granting her the right of counsel, or the right of communicating with her friends, or having her friends or relatives communicate with her, from the 1st of September to and including the 20th day of September, and by said action preventing the detained from being advised by her relatives, friends and legal adviser of the reason for her having been taken into custody, and what her rights and privileges were in the premises, so that she acting upon said advice could have given all the information desired of her in the proceeding pending against her.

We desire further to protest against the incorporation in the record herein of the testimony

taken upon the 1st day of September, 1915, and on the 2d day of September, 1915, from Wong Him Sing, otherwise known as Wong Ngee Ting, on the ground that the said testimony was taken in the proceeding contemplated against the said Chin Ah Yoke, and that the detained was at said hearing not permitted to be present with her counsel, so that she might question the said witness with respect to the subject matter of (58) his evidence detrimental to the said detained, and it is now desired and requested that the said Wong Him Sing be recalled as a witness, so that he may be examined or cross-examined at the instance of the said Chin Ah Yoke, and that now the right of attorney having been accorded her she may submit evidence on her own behalf from said witness.

Request is hereby made that the statements made by 'two of the girls under Miss Cameron's care,' wherein this Chin Ah Yoke was identified as a certain Gum Chi, and further as a certain Bow Heung, may be presented and filed with the record herein, so that they may be inspected by the said detained and her counsel. It is also desired that the warrant of arrest for the certain Gum Chi alias Bow Heung be also presented for the inspection of the said Chin Ah Yoke and her counsel. The said Chin Ah Yoke in furtherance of the above and foregoing request desires to state that if the said requests are not complied with she desires to protest at the said refusal to

so comply with her said request, and to protest the action of the officer before whom this hearing was conducted.

The said Chin Ah Yoke does further desire to protest against the said proceeding on the ground that she is a native born citizen of the United States, and that there is no evidence of her being other than a native-born citizen of the United States, and that the said proceeding herein is for said reason null and void and in violation of the constitutional rights and liberties of such native born citizen of the United States.

Respectfully submitted,

GEO. A. McGOWAN,

Attorney for Chin Ah Yoke." (59)

On January 4, 1916, an affidavit of Donaldina Cameron was presented by the government to show that the Mon Ming Hotel had "been used as a rendezvous for slave girls and their owners." (Tr. 68)

On January 5, 1916, Immigrant Inspector John A. Robinson filed a certificate attesting that

(Tr. 69)

"This is to certify that I have known the Mon Ming Hotel situated at 868 Clay Street, San Francisco, Calif., as a rendezvous for Chinese prostitutes and their consorts for the past three years or more."

On the same day the said John A. Robinson submitted a report certifying that he had heard a report

from a Chinese source that the woman arrested at the Mon Ming Hotel on September 1st last, was Wong Ah Mui, who had come "to this country a few years ago as the wife of Lim Mar of Berkeley, California; that she was a prostitute and had a pimp named Chim Pak—that the man who brought her to this country had returned to China." (Tr. 69.)

On January 8th, 1916, Inspector in charge of the Immigration Division J. X. Strand, submitted his memorandum to the Commissioner (Tr. 70)

On March 17th, 1916, the Acting Commissioner answers the protests and exceptions of the appellant as follows:

(Tr. 30-31)

> "In connection therewith it is noted that you filed a brief of exceptions, wherein you protest against the admission of the testimony of Wong Him Sing on the ground that the detained was not confronted by said witness and was not accorded the privilege of cross-examination by counsel, as a result of which you request the recall of that witness. In reply thereto you are advised that it is the understanding of this office that said witness lives in Yuma, Arizona, and that he was only in this city on a visit at the time the defendant was taken into custody; and that this office has no authority or process by which his attendance as a witness could be compelled, or funds from which to defray the expenses incident thereto. It is unnecessary to state, however, that it is the desire of this office

to hear all witnesses in the alien's behalf, and that if you wish to introduce this man as your witness, and have any means by which to accomplish that purpose, an opportunity will be accorded for the taking of such additional testimony. With regard to your further request that there be made part of the record (28) statements of girls in a Presbyterian Mission who identified the defendant as Gum Chi or Bow Heung, and that there be produced for your inspection the warrant of arrest for the last-mentioned person, you are advised that it does not appear from the record that those statements were recorded, and the first part of your request cannot therefore be complied with. You are informed, however, that these references in the record to Gum Chi and Bow Heung are entirely immaterial, and the introduction of the warrant of arrest in that case cannot therefore serve any useful purpose.

Also on March 17th, 1916, the Acting Commissioner forwarded the record to the Commissioner General of Immigration at Washington (Tr. 26-27-28-29), and referring therein to the protests and exceptions of appellant states as follows:

(Tr. 28-29)

It will be noted that the attorney of record has protested and excepted to the fact that the alien was held incommunicado from the date of her arrest until counsel was permitted to enter the

proceedings; to the admission of the testimony of Wong Him Sing (taken into custody in company with the alien) on the ground (26) that the alien was not present with counsel; and to the fact that the privilege of cross-examination was not accorded; and has requested that the latter witness be recalled for the defense. It is believed that the action of this office was in no way prejudicial to the interest of the alien, and was entirely in accord with the regulations. It has assumed the position, and has so advised the attorney, that the further testimony of Wong Him Sing will be taken if his production is secured by counsel, this office having no power or process by which to compel his attendance as a witness, nor funds from which to defray the expense incident thereto. As to the right of cross-examination, it would appear that adjudicated cases hold that such privilege cannot be claimed as a right. The attorney's demand that testimony and warrants referring to certain Gum Chi or Bow Heung be made a part of the record has been denied, first on the ground that the statements referred to were not made of record, and secondly, because they were subsequently shown to be immaterial."

On April 12th, 1916, the Secretary of Labor issued his warrant of deportation against appellant. (Tr. 25-26)

The questions presented in this matter are:

First—That the court erred in holding that the Secretary of Labor could issue a warrant of arrest without probable cause and unsupported by oath or affirmation.

Second—That the court erred in holding that the Secretary of Labor and the Commissioner of Immigration could withhold part of the evidence upon which the warrant of arrest was issued and also refuse to produce same for use as evidence upon the request of the appellant.

Third—That the court erred in holding that the Secretary of Labor and the Commissioner of Immigration could disregard the affidavits establishing a prima facie case of citizenship, without first having a hearing to examine the witnesses who had submitted affidavits.

Fourth—That the court erred in holding that the Secretary of Labor and the Commissioner of Immigration accorded the appellant a fair hearing, they having held her incommunicado without the right of counsel from September 1, 1915, to September 21, 1915, to her great prejudice, permitting a then available witness to depart, and further prejudicing her rights.

FIRST:

THAT THE COURT ERRED IN HOLDING THAT THE SECRETARY OF LABOR COULD ISSUE A WARRANT OF ARREST WITHOUT PROBABLE CAUSE AND UNSUPPORTED BY OATH OR AFFIRMATION.

Article IV in amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

The application for the warrant of arrest (Tr. 32-33), which is on a printed form, assumes the appellant to be an alien without any showing of alienage in support thereof. The application speaks of "the attached certificate," and yet there is no such certificate attached to the application. Under the caption as follows:

> (Tr. 33)
>
> (1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth

the facts within the knowledge of the informants.)

Which calls for all of the facts, alienage as well as derilection, we find but the following given:

"Alien found in compromising surroundings with a man. Both detained. Man later released when landing was verified, as son of Native. Man stated to Inspector Robinson that woman was a prostitute. Alien as yet refuses to talk. It is believed that she may be Gum Chi, alias Bow Heung, warrant number 53210-76, dated June 17, 1911."

The application for the warrant concludes as follows:

(Tr. 33)

"Pursuant to Rule 22 of the Immigration Regulation there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States."

Rule 22 subdivision 2 of the Immigration Regulations is as follows:

"*Application for warrant of Arrest*—The application must state facts, bringing the alien within one or more of the classes subject to deportation after entry. The proof of these facts should be the best that can be obtained. The application must be accompanied by a certificate of

landing (to be obtained from the immigration officer in charge at the port where landing occurred) or a reason given for its absence, in which case effort should be made to supply the principal items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been made and forwarded by mail, and (2) the substance of the facts and proof therein contained."

The certificate referred to was never filed with the application. The letter of the Commissioner of Immigration of March 17th, 1916, finally transmitting the entire case to the Department of Labor, recites as follows:

(Tr. 26)

"It will be noted that the record is slightly out of chronological order, due to the fact that the formal request for the warrant of arrest does not indicate what, if any, evidence was transmitted therewith; for which reason the transcript of testimony of Wong Him Sing (the man who was in company with the alien at the time of her apprehension), taken on September 1st and 2d, is appended to the recorded."

This extract virtually admits that not only was no evidence transmitted with the application for the warrant of arrest, but no attempt was made to make a showing by evidence to the Secretary that the per-

son for whom the warrant of arrest was asked was in point of fact an alien. When we examine the record we find the application for the warrant, which is dated September 4-15, recites (Tr. 33) "Alien as yet refuses to talk," which was in effect a misrepresentation and suppression of the testimony given by this appellant, for while she did refuse to make an extended statement, she did on September 1st, 1915, answer some few questions, as appears at the end of the examination of the witness Wong Him Sing, from which the following is an extract: (Tr. 44)

"Q. When did you come to the United States?

A. I was born in the United States.

Q. Have you any documentary evidence to show that?

A. I have not here. It is with my attorneys."

The transcript of the testimony of the Wong Him Sing mentioned contains no testimony showing or tending to show that this appellant is an alien.

The procedure followed in the application for the warrant of arrest discloses a condition which is in substance much more than a delegation of power by the Secretary of Labor at Washington to the Commissioner of Immigration of San Francisco, which was overturned by this court in the case of Low Kwai vs. Backus, 229 Fed. 481, wherein it was held as follows:

"In this instance the acting Commissioner of Immigration undertook, as has been seen, to

satisfy the Secretary of Commerce and Labor that the woman here in question had violated the law, by simply saying:

'It is stated from an anonymous source that this woman is now practicing prostitution in either the Oriental Hotel or the Republic Hotel, keeping one of the rooms in either hotel from time to time. She was landed as the wife of a native, but her husband deserted her.'

The mere statement from an anonymous source that the woman referred to was violating the law evidently, and very properly, did not satisfy the Secretary of such fact, and, instead of requiring some sufficient evidence thereof, he undertook to depute to the Commissioner of Immigration at Angel Island, Cal., to satisfy himself, and thus to decide the question authorizing the arrest of the party charged that was committed by Congress to the Secretary of Commerce and Labor only. That course, in our opinion, was wholly unauthorized by the statute.

It results that the order appealed from must be reversed, and the cause remanded, with directions to discharge the petitioner. It is so ordered."

See also *Hanges* vs. *Whitfield,* 222 Fed. 745, *Ex parte Lam Pui* 217 Fed. 456, *Ex Parte Lam Fuk Tak* 217 Fed. 469 and *Jouras* vs. *Allen* 222 Fed. 756.

It is obvious that not only has the discretion committed to the Secretary of Labor by the statute been abused, but even the Constitution of the United

States and its inhibitions are disregarded in issuing warrants of arrest unsupported by oath or affirmation and in the face of a claim of American citizenship, even though knowledge of the said claim was thus withheld from the Secretary by the local Commissioner.

In the case of *Moy Suey* vs. *United States,* 147 Fed. 697, the Circuit Court of Appeals for the Seventh Circuit Court, speaking through Circuit Judge Grosscup, held as follows: Pages 698-699:

> "But when a person physically and politically present in the United States at the time he is arrested for deportation, claims that he is an American born citizen, and resists deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that Congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts, in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. When such right is in court asking for the protection of the law, no question of public policy can affect it. The citizen deported is banished and banishment is a punishment that can follow only a judicial determination in due process of law. Black's Law Dictionary, 4 Blackstone Commentaries, 377."

"But there is a fundamental distinction between the case of a citizen of the country who has left the country and is asking to re-enter it, and is a citizen of the country who has never left it, but whom the government is asking to deport; and while it is true, now that the Supreme Court has so decided that the political power of the government may say whether a citizen of the country who has gone away shall be allowed to return or not, it seems to us uncontrovertible that a citizen of the country, who has not gone out may not be deported or banished until the right of the government to deport or banish has benn judicially determined. And, approached from this point of view, the case made out by appellant entitles him to a reversal of the order of the District Court. The order of the District Court, affirming the order for the deportation of appellant is reversed, and the cause remanded with instructions to discharge the appellant."

See also *Gee Cue Bing* vs. *United States,* 184 Fed. 383, a later case by the Circuit Court of Appeals for the Fifth Circuit.

SECOND:

THAT THE COURT ERRED IN HOLDING THAT THE SECRETARY OF LABOR AND THE COMMISSIONER OF IMMIGRATION COULD WITHHOLD PART OF THE EVIDENCE UPON WHICH THE WARRANT OF ARREST WAS ISSUED AND ALSO REFUSE TO PRODUCE SAME FOR USE AS EVIDENCE UPON THE REQUEST OF THE APPELLANT.

The regulations promulgated which govern such executive deportation proceedings are found in Rule 22 sub. 4 as follows:

> "Executive of warrant of arrest and hearing thereon:
>
> (a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported.
>
> (b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the fur-

ther conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief."

Upon the hearing we find the following:

(Tr. 55)

Q. You are now brought before me, an immigrant inspector, to give you an opportunity to show cause, if you have any, why you should not be deported in conformity with law.

A. I can give you no other reason except I was born here.

Q. You are further notified that you have the privilege of inspecting the warrant of arrest and all the evidence upon which it was issued.

The evidence upon which the warrant of arrest was presumably issued was the application therefore, and said application contained the following:

(Tr. 33)

"It is believed that she may be Gum Chi, alias Bow Heung warrant number 53210-76, dated June 17, 1911."

On September 7, 1916, the following was placed of record in a hearing held on that day:

(Tr. 51)

"NOTE: This alien was taken to Miss Cameron's Mission the other day by Inspector Robinson of this Service and two of the girls under Miss Cameron's care, formerly inmates of houses of prostitution, identified this girl, one stating that she was Gum Chi, the other one stating that she was Bow Heung. Warrants of arrest have been issued for a certain Gum Chi with the alias Bow Heung, and it is my understanding these girls stated that the girl now under arrest was an inmate of a house of prostitution at 12 Portola Alley. If this information is correct it is evident that she is a girl reported to this office some time ago as having been smuggled into this country from the steamer "Manchuria." An investigation along that line is now being made inasmuch as the alien refuses to give any information concerning her nativity."

Now the warrant of deportation herein is based on the conclusion that this appellant Chin Ah Yoke is really Wong Ah Muy, an alien who arrived at San Francisco on the Shinyo Maru, October 7, 1912. Chin Ah Yoke firmly denies this, and the Immigration officers as firmly affirms it. Now it is obvious that if this appellant was identified as a Chinese woman for whom a warrant of arrest had been issued charging her under the fictitious or fanciful names of Gum Chi, alias Bow Heung, and said warrant was dated June 17, 1911, she, this appellant, could not well be the Wong Ah Muy, who did not enter the United

States until October 7, 1912, almost sixteen months after the issuance of said warrant. This appellant was positively identified by two witnesses as the Chinese woman for whom the Gum Chi alias Bow Heung warrant was issued (Tr. 51), which warrant was issued on June 17th, 1911, and as it presumably follows the usual printed form that warrant alleges a residence in the United States for some time prior thereto, hence this warrant and the evidence upon which it was issued would render untenable the theory of the Immigration officers that the appellant was the Wong Ah Muy who first entered the United States on October 7, 1912, and would most substantially corroborate the appellant claim that the Immigration officers have made a mistake of identity in attempting to identify her as Wong Ah Muy.

The regulations governing such hearings accord the appellant and her counsel the right to inspect the evidence on which the warrant was issued and also to offer evidence (Rule 22, Sub. 4, (a) and (b) supra) and to exercise this right the appellant by her counsel made seasonable application on December 20, 1915.

(Tr. 66-67)

> "Request is hereby made that the statements made by ' two of the girls under Miss Cameron's care,' wherein this Chin Ah Yoke was identified as a certain Gum Chi, and further as a certain Bow Heung, may be presented and filed with the record herein, so that they may be inspected by the said detained and her counsel. It is also de-

sired that the warrant of arrest for the certain Gum Chi alias Bow Heung be also presented for the inspection of the said Chin Ah Yoke and her counsel. The said Chin Ah Yoke in furtherance of the above and foregoing request desires to state that if the said requests are not complied with she desires to protest at the said refusal to so comply with her said request, and to protest the action of the officer before whom this hearing was conducted.

The request was disposed of by the Acting Commissioner three months later, March 17, 1916, as follows, quoting first from his letter to the appellant's counsel.

(Tr. 30-31)

"With regard to your further request that there be made part of the record (28) statements of girls in a Presbyterian Mission who identified the defendant as Gum Chi or Bow Heung, and that there be produced for your inspection the warrant of arrest for the last-mentioned person, you are advised that it does not appear from the record that those statements were recorded, and the first part of your request cannot therefore be complied with. You are informed, however, that these references in the record to Gum Chi and Bow Heung are entirely immaterial, and the introduction of the warrant of arrest in that case cannot therefore serve any useful purpose."

And in the letter of the Acting Commissioner on

the same date, March 17, 1916, to the Commissioner-General of Immigration as follows:

(Tr. 29)

> "The attorney's demand that testimony and warrants referring to a certain Gum Chi or Bow Heung be made a part of the record has been denied, first on the ground that the statements referred to were not made of record, and secondly, because they were subsequently shown to be immaterial."

The statements of these two girls in the Presbyterian Mission may not have been reduced to writing and made of record in the case of this appellant, but their evidence may none the less have been of record as part of the foundation for the issuance of the Gum Chi or Bow Heung warrant 53210 7-6, dated June 17, 1911, which evidence this appellant was unsuccessful in her endeavors to have incorporated in the record in her case.

The phrases "shown to be immaterial" and "entirely immaterial," in the letters quoted from are the conclusions drawn from the Memorandum for the Commissioner dated Jan. 8, 1916 of J. X. Strand (Tr. 70-71) from which the following is quoted:

> "I accordingly searched the book of arrivals in the Chinese Division covering the period in question, and finally located the record of Lim Yuen, 12017/5546, and from this record traced that of Wong Ah Mui (record No. 11266/32029, both herewith as exhibits), and from the photo-

graph of this applicant I readily identified her as the girl now under arrest; a comparison of the enlarged photographs 3 and 4, taken of the girl under arrest, with the enlargements of the photographs 1 and 2 taken of the girl who was admitted, shows conclusively that they represent one and the same person—[63] the pit at the inner corner of right eyebrow and on left cheek demonstrate this."

The evidence suppressed and withheld in violation of the said regulations and which the appellant was prevented from submitting for the consideration of the Secretary of Labor, was diametrically opposed to the conclusions of Inspector Strand and Acting Commissioner Boyce, and would we submit, have shown that they had made a mistake in identity. The entire evidence should have been received, so that the Secretary might have received and weighed the same, instead of being limited in his consideration of this case to the conclusion of Inspector Strand. The function of judgment and consideration of the evidence is an obligation placed by statute upon the Secretary of Labor, and when evidence is offered it should be received and considered by that official. His subordinates, located thousands of miles away from him, cannot exercise this function for him. In the present case the evidence was in the possession of the local authorities and they wilfully withheld the same from the appellent and her counsel and the Secretary of Labor as well, and imposed upon them their adverse conclusion instead of the evidence. In re *Cam Pon,*

168 Fed. 479, This Court held as follows, Judge Gilbert speaking.

> "But the applicant upon his appeal from the decision of the local officer was entitled to the benefit of all the material evidence which was before the inspector. To withhold any thereof, and to exclude it from the record on the appeal, was to deny him the right of appeal which the statute gives him. The testimony of a witness which was on the whole favorable to the applicant's contention was by inadvertence omitted from the record on the appeal, and was not considered in the hearing thereof. It makes no difference that such evidence was taken at the instance of the inspector, and that it never came to the attention of the applicant or his counsel; it was a portion of the evidence taken by the inspector as an officer of the government, whose duty it was to act impartially and to ascertain the truth as to the question at issue. A portion of the testimony so omitted was direct evidence to the effect that the applicant was born within the United States. The inspector discredited it, but the applicant was entitled to the benefit of it on the appeal. It is no answer to this to say that portions of the testimony of that witness tended to contradict certain statements of Look Wing. Having been denied the benefit of all the testimony taken upon the question of his right of admission to the United States, the applicant has been deprived the right of appeal which the

statute confers upon him, and he may, therefore, upon habeas corpus, test the legality of his imprisonment. In re Monaco (C. C.) 86 Fed. 117; *United States* vs. *Wong Chung* (D. C.) 92 Fed. 141; *United States* vs. *Chin Fee* (D. C.) 94 Fed. 828; *Rodgers* vs. *United States,* 152 Fed. 346, 81 C. C. A. 454; *United States* vs. *Nakashima,* 160 Fed. 842, 87 C. C. A. 646."

The right to submit evidence has been abundantly upheld by the Supreme Court of the United States. *Chin Yow* vs. *U. S.* 208 U. S. 8, wherein the Court held, Justice Holmes speaking:

> "We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or rule 7, commented on in *United States. vs. Sing Tuck,* 194 U. S. 161, 169, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the Judge, that a hearing properly so called was denied, the merits of the case are not open, and we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

and also in the case of *Low Wah Suey* vs. *Backus,* 225 U. S. 460.

THIRD:

THAT THE COURT ERRED IN HOLDING THAT THE SECRETARY OF LABOR AND THE COMMISSIONER OF IMMIGRATION COULD DISREGARD THE AFFIDAVITS ESTABLISHING A PRIMA FACIE CASE OF CITIZENSHIP WITHOUT FIRST HAVING A HEARING TO EXAMINE THE WITNESSES WHO HAD SUBMITTED AFFIDAVITS.

Possibly the best preliminary exposition of the point would be to quote the allegation in the petition with respect thereto: (Tr. 4, 5, and 6)

> "But on the contrary your petitioner alleges that she is not an alien, but a native-born citizen of the United States of America, having been born on or about the 23rd day of March, 1896, at No. 708½ Commercial St., in the city and county of San Francisco, State of California, of parents of the Chinese race then lawfully domiciled within the United States, and your affiant's father, Chin Duck Quong, has ever since been, and is now lawfully domiciled within [3] the United States, and that your petitioner's mother, Lee Shee, was at the time of the birth of your petitioner lawfully domiciled within the United States, and continued to reside herein until the time of her death, on or about the 20th day of June, 1900, at the family domicile at No. 708½ Commercial St., in the city and county, State aforesaid, and that your petitioner has re-

sided continuously within the United States from the time of her birth up to the present time, and in support of the said fact your petitioner offered at the hearing before the said Commissioner the sworn affidavit of your petitioner, the affidavit of your petitioner's father, the said Chin Duck Quong, the affidavit of Ho Shee, a Chinese woman who lived in the building in which your petitioner was born, and knew your petitioner from the time of her birth, and took care of, and raised your petitioner, after the death of your petitioner's mother, the affidavit of Chin Shee, a Chinese woman who has known your petitioner since your petitioner's birth, and knows that your petitioner is a citizen of this country, and has always resided herein, together with the affidavit of Chin Pak, who has known your petitioner since your petitioner was two or three years of age. Each of the said affidavits hereinabove referred to are annexed hereto in Exhibit "A," hereinafter mentioned, and your petitioner now specifically refers to said affidavits, with the same force and effect, as if the said affidavits, and each of them, were set forth in full herein, and immediately upon the arrest of your petitioner, and at all times thereafter your petitioner has maintained that she was a native-born citizen of the United States of America, and denied that she was the Wong Ah Mui, as claimed by the said Commissioner, and that the showing made by your petitioner of the fact that she was

a native-born citizen of the United States of America was more than a *prima facie* showing of the existence of the said [4] American citizenship of your petitioner, and your petitioner alleges that it was an abuse of discretion upon the part of the said Secretary of Labor and the said Commissioner of Immigration, and the immigration officials acting under, or in pursuance of their orders, to have ignored or decided against the said *prima facie* showing without first having examined and investigated the same, and your petitioner alleges that although the affidavits attesting the citizenship of your petitioner were filed with the said Commissioner, in opposition to the claim and contention of the said Commissioner that your petitioner was Wong Ah Mui, who had first entered the United States upon the 7th day of October, 1912, the said Commissioner, and the said Secretary of Labor violated the discretion committed to them by statute in such cases made and provided, and ignored and disregarded the said showing of citizenship, upon behalf of your petitioner, and failed and neglected to conduct an investigation or examination of the witnesses who had subscribed and sworn to the said affidavits, and the said Commissioner afforded your petitioner only the semblance of a hearing upon the question of her citizenship, in which they decided that she was not a citizen of the United States, without examining or conducting any investigation of

the witnesses who were the affiants of affidavits presented by your petitioner.

The affidavit of Chin Ah Yoke is found Tr. 56-57 and 58; The affidavit of her father Chin Duck Quong is found Tr. 58, 59 and 60; The affidavit of Ho Shee is found Tr. 60, 61 and 62; The affidavit of Chin Shee is found Tr. 62 and 63, and the affidavit of Chin Pak is found Tr. 64 and 65.

United States vs. *Wong Kim* Ark, 169 U. S. 649.

The supreme Court held in the case of *U. S.* vs. *Sing Tuck* 194 U. S. 161, as follows:

> "We are of the opinion that the attempt to disregard and override the provisions of the statutes and the rules of the Department, and to swamp the courts by a resort to them in the first instance, must fail. We may add that, even if it is beyond the power of Congress to make the decision of the Department final upon the question of citizenship, we agree with the circuit court of appeals that the petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a *prima facie* case. A mere allegation of citizenship is not enough. But, before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether after that, a further trial may be had we do not decide."

The only evidence that appellant is an alien is the

opinion of the Immigration officers that she is Wong Ah Moy. If she is Chan Ah Yoke and not Wong Ah Muy, then the government's case falls. The appellant offered to prove she was not Wong Ah Muy, by offering the evidence considered under the Second Point of this brief. The Inspector rejected the evidence therein referred to, and substituted his personal judgment and opinion for the Secretary's consideration, in lieu of the said evidence. Under this, the Third Point, we are to consider the offer of the Appellant to prove affirmatively her American birth. The mistake in law made by the Cimmissioner and the Secretary, is aptly expressed in the letter from the former to the latter (Tr. 28) wherein it is written:

> "To meet the burden of proof resting upon the defendant, affidavits of the woman under arrest, of her alleged father, and of three other Chinese persons, have been introduced, all of which are intended to establish her claimed American birth; but in the opinion of this office that showing is far from convincing, even in the absence of the—to my mind—conclusive proof presented by the landing record referred to. In view of the above facts it is recommended that a warrant of deportation issue."

In an executive deportation proceeding there is as a matter of law, no BURDEN OF PROOF RESTING UPON THE DEFENDANT. In fact the law places the burden of proof of alienage upon the moving party—the Government—and their decision

must be based on some evidence.

In re *Ong Chew Lung* vs. *Burnett,* 232 Fed. 853, this court held speaking through Circuit Judge Gilbert:

> "It is not our function to weigh the evidence in this class of cases; but we may consider the question of law whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion, and not upon evidence. In the absence of substantial evidence to sustain the same, and order of deportation is arbitrary and unfair, and subject to judicial review. *Whitfield* vs. *Hanges* 222 Fed. 745, 751, 138, C. C. A. 199; *McDonald* vs. *Siu Tak Sam,* 225 Fed. 710, 140 C. C. A. 584; *Ex parte Lam Pui* (D. C.) 217 Fed. 456."

See also *Chan Kam* vs. *U. S.* 232 Fed. 855 which is an opinion by this Court written by Circuit Judge Marrow, in which the same principle is upheld.

Lewis vs. *Frick* 233 U. S. 291.

U. S. vs. *Williams* 200 Fed. 538.

U. S. vs. *Williams* 189 Fed. 915
affirmed in 206 Fed. 460.

U. S. vs. *Williams* 175 Fed. 274.

A defendant must have a fair opportunity to present evidence in his favor *Chin You* vs. *U. S.* and in re *Cam Pon,* supra, and must also be appraised of the evidence against her. *Ex parte Petkox* 212 Fed. 275.

In the present case the evidence of the witnesses for the appellant as outlined in the affidavits as the foundation of their examination was received by the Immigration authorities on Dec. 20, 1915, and held until March 17, 1916, and then on that day without the witnesses having been heard or examined at all, the bare affidavits were sent to the Secretary of Labor with the comment (Tr. 28)

> "but in the opinion of this office that showing is far from convincing, even in the absence of the—to my mind—conclusive proof presented by the landing record referred to. In view of the above facts it is recommended that a warrant of deportation issue."

Here is a case where the appellant was accorded but a semblance of a hearing, not a hearing in accordance with the fundamental principles that inhere in due process of law nor any fair or adequate opportunity to present her evidence or be heard in good faith.

Chin You vs. *U. S.* 208 U. S. 8 (Supra)

Yamataya vs. *Fisher* 189 U. S. 86.

Ex parte Petkos 212. Fed. 275 (supra.)

In re *Cam Pon* 168 Fed. 479 (supra.)

During the period of almost three months which elapsed from Dec. 20, 1915 to March 17, 1916, during which these affidavits, which set forth the scope of this appellant's case, were held by the Commissioner of Immigration, hundreds of persons of the Chinese race, claiming American citizenship through birth

therein and through the operation of Sec. 1993 of the Revised Statutes, have applied to that official for admission into the United States, and in no instance has even a single such case been disposed of without having a hearing at which the witnesses were called for and thoroughly examined by question and answer touching the facts upon which the claim of citizenship was based. How then can it be held that a full and fair hearing has been accorded this appellant upon the sacred ground of American citizenship when her witnesses have not been heard or examined at all, as would have been done had she sought admission into the United States as a native-born citizen thereof. In the cases of *Moy Suey* vs. *United States* 147 Fed. 697 Supra and *Gee Cue Bing* vs. *United States* 184 Fed. 383 Supra, it was held that the person physically and politically present when arrested within the United States was entitled to greater rights and privileges than the person who had voluntarily left and sought to re-enter the United States. In the case at bar the appellant is denied even equal rights with applicant for admission, much less the greater right upheld in the two cases last cited. If appellant sought re-entry into the United States and presented the affidavits filed in this case, the different affiants would have been made the subject of prompt examination by question and answer, and in no instance would that highest test of credibility and method of ascertaining the truth have been withheld from such an applicant for admission, and this being so, upon what legal principle can at least

the equal privilege be accorded when the person asserting American citizenship is arrested when politically and physically present in the United States?

The sacred rights of American citizenship should have adequate protection from the arbitrary action of executive officers, and an opportunity to be heard which is at least adequate to the importance of the great issue involved.

FOURTH.

THAT THE COURT ERRED IN HOLDING THAT THE SECRETARY OF LABOR AND THE COMMISSIONER OF IMMIGRATION ACCORDED THE APPELLANT A FAIR HEARING, THEY HAVING HELD HER INCOMMUNICADO WITHOUT THE RIGHT OF COUNSEL FROM SEPTEMBER 1, 1915, TO SEPTEMBER 21, 1915, TO HER GREAT PREJUDICE, PERMITTING A THEN AVAILABLE WITNESS TO DEPART AND FURTHER PREJUDICE HER RIGHTS:

This appellant was arrested September 1, 1915 and on that day she testified as to her American citizenship (Tr. 44.) On September 2, 1915, the warrant of arrest was issued and it provided as follows: (Tr. 31-32)

> "Pending disposition of her case the alien may be released from custody upon furnishing satisfactory bond in the sum of $1,000.00."

The right of bail in such cases is not based alone on the regulations, which recite as follows: Rule 22, subd. 5:

> "Sub. 5 Release under bond. The amount of any bond under which an arrested alien may be released shall be $500.00, unless different instructions are given by the Department, which also shall, prior to release, approve the bond, except that the approval of the local United States Attorney as to form and execution shall be sufficient where, to avoid delay, the immigration officer in charge deems it proper to submit the bond to such attorney for approval. Aliens who are unable to give bail shall be held in jail only in case no other secure place of detention can be found."

are not the source of power in this matter of bail but in turn are based on the statute, the General Immigration Law, provided in Sec. 20 as follows:

> "That pending the final disposition of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than $500.00 with security approved by the Secretary of Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States."

The hearing of September 1st, 1915, recites as follows: (Tr. 44)

"Q. When did you come to the United States?

A. I was born in the United States.

Q. Have you any documentary evidence to show that?

A. I have not here. It is with my attorneys.

Q. Where are your parents?

A. I don't want to tell you anything about them.

Q. How do you expect to leave this station unless you furnish us [39] with information to satisfy us that you are entitled to remain in the United States, you being of the Chinese race?

A. Don't care; I don't want to tell you anything.

Q. Do you realize that you will be held at this station until you make the proper statement to show your right to be in the United States?

A. I don't see why you could deport me, or why I cannot stay in this country."

The hearing of September 20th, 1915 recites as follows: (Tr. 55)

"Q. You are further notified that you have the privilege of employing counsel. Do you wish to avail yourself of that privilege?

A. My case is taken care of by my father.

Q. Do you wish to employ counsel to repre-

sent you in any further hearing in this case?

A. I leave that to my father. He can hire an attorney for me.

Q. Your attorney, no doubt, will make the necessary arrangements for your release under bond in the sum of $1,000, that being permitted under the terms of the warrant, when we were satisfied as to your identity. A. All right.

It is shown that the right of bail was withheld from September 1, 1915 to September 20, 1915 in defiance of the plain direction of the Statute.

It is further shown that the right of counsel was withheld until September 20th, 1915, until long after the witness, Wong Him Sing, had been released and permitted to go his way. When the right of counsel was accorded, the work of this witness in advising this appellant out of the plentitude of his criminal experience (Tr. 40-41-46-47) to give no information about herself or who or what she was until an attorney could come and see her and talk to her (Tr. 57) had left its venemous sting, and we find the appellant guided by that advice so given her, and then being misjudged and discredited therefore.

A certain protest and request was made with respect to this witness Wong Him Sing on December 20, 1915, as follows:

(Tr 66)

"We desire further to protest against the incorporation in the record herein of the testimony taken upon the 1st day of September, 1915, and

on the 2d day of September, 1915, from Wong Him Sing, otherwise known as Wong Ngee Ting, on the ground that the said testimony was taken in the proceeding contemplated against the said Chin Ah Yoke, and that the detained was at said hearing not permitted to be present with her counsel, so that she might question the said witness with respect to the subject matter of [58] his evidence detrimental to the said detained, and it is now desired and requested that the said Wong Him Sing be recalled as a witness, so that he may be examined or cross-examined at the instance of the said Chin Ah Yoke, and that now the right of attorney having been accorded her she may submit evidence on her own behalf from said witness.

This protest was answered to appellant's attorney almost three months later, March 17, 1916, as follows: (Tr. 30)

"In connection therewith it is noted that you filed a brief of exceptions, wherein you protest against the admission of the testimony of Wong Him Sing on the ground that the detained was not confronted by said witness and was not accorded the privilege of cross-examination by counsel, as a result of which you request the recall of that witness. In reply thereto you are advised that it is the understanding of this office that said witness lives in Yuma, Arizona, and that he was only in this city on a visit at the time the defendant was taken into custody; and

that this office has no authority or process by which his attendance as a witness could be compelled, or funds from which to defray the expenses incident thereto. It is unnecessary to state, however, that it is the desire of this office to hear all witnesses in the alien's behalf, and that if you wish to introduce this man as your witness, and have any means by which to accomplish that purpose, an opportunity will be accorded for the taking of such additional testimony."

In transmitting the record to the Secretary of Labor on March 17th, 1915, the following was set forth: (Tr. 28-29)

"It will be noted that the attorney of record has protested and excepted to the fact that the alien was held incommunicado from the date of her arrest until counsel was permitted to enter the proceedings; to the admission of the testimony of Wong Him Sing (taken into custody in company with the alien) on the ground [26] that the alien was not present with counsel; and to the fact that the privilege of cross-examination was not accorded; and has requested that the latter witness be recalled for the defense. It is believed that the action of this office was in no way prejudicial to the interest of the alien, and was entirely in accord with the regulations. It has assumed the position, and has so advised the attorney, that the further testimony of Wong

> Him Sing will be taken if his production is secured by counsel, this office having no power or process by which to compel his attendance as a witness, nor funds from which to defray the expense incident thereto. As to the right of cross-examination, it would appear that adjudicated cases hold that such privilege cannot be claimed as a right."

The testimony of Wong Him Sing was assumed by the acting Commissioner in his said letter to the Secretary of Labor to be the basis of the application for the warrant of arrest: (Tr. 26)

> "It will be noted that the record is slightly out of chronological order, due to the fact that the formal request for the warrant of arrest does not indicate what, if any, evidence was transmitted therewith; for which reason the transcript of testimony of Wong Him Sing (the man who was in company with the alien at the time of her apprehension), taken on September 1st and 2d, is appended to the record."

It at once becomes apparent how essential it would have been to the proper protection of the rights of this appellant to have shown by this witness Wong Him Sing, that he had advised her, as she sets forth in her affidavit (Tr. 56-57) and thus corroborated the showing of the appellant and not left her alone to stand the burden of this advice which in the black hour of her distress had guided her conduct before the Immigration officers, and prompted her to with-

hold the information about her birth, antecedents and life in this country, which would otherwise have been most freely given by her, and would not have so discredited her that the Immigration officers refused to investigate and examine her evidence of American citizenship.

The right of counsel should be timely given, that is,—given when it will be of some substantial service to such a person so proceeded against, not withheld until the witness, who should have been examined, has traveled thousands of miles away, and is now no longer accessible.

Hanges vs. *Whitfield* 209 Fed. 675.

Ex parte Lam Pui. 217 Fed. 456.

Ex parte Lam. Fuk Tak 217. Fed. 469.

Jouras vs. *Allen* 222 Fed. 756.

Whitfield vs. *Hanges* 222 Fed. 745.

In the latter case, decided by the Circuit Court of Appeals for the Eighth Circuit, it is held:

> "Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity after all the evidence against him is

produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it In re *Rosser* 101, Fed. 562, 567, 41 C. C. A. 497; In re *Wood & Henderson,* 210 U. S. 246, 254, 28 Sup. Ct. 621, 52 L. Ed. 1046; *Interstate Commerce Commission* vs. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91-93, 33 Sup. Ct. 185, 57 L. Ed. 431, *Ex parte Petkos,* (D. C.) 212 Fed. 275-278; *United States vs. Sibray* (C. C.) 178 Fed. 144-149. That is not a fair hearing in which the inspector chooses or controls the witnesses or prevents the accused from procuring the witnesses or evidence or counsel he desires. *Chin Yow* vs.*United States,* 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; *United States* vs. *Sibray* (C. C.) 178 Fed. 144, 149; *United States* vs. *Williams* (D. C.) 185 Fed. 598, 604; *Roux* vs. *Commissioner of Immigration,* 203 Fed. 413, 417, 121 C. C. A. 523." * * *

* * *

"The provisions of the rule that the inspector shall grant the alien a hearing, that during the hearing he shall be permitted to inspect the warrant, and that at such stage thereof as the officer deems proper he shall be permitted to have counsel were made for the benefit of the alien for the purpose of giving him a fair trial. The liberty, and the property also, for if he is imprisoned he

must lose his business and sacrifice his property, of a permanent resident alien, like the appellees, as well as their deportation, are involved in the issue, and these provisions of the rule should be liberally construed to accomplish their plain purpose. To the same end the discretion of the inspector in determining when the alien shall inspect the warrant and when he shall have counsel should be exercised, so that his hearing shall be full and fair. A denial of permission to him to see the warrant and to have counsel within five minutes of the close of the hearing would be a clear abuse of discretion, and would render the provisions of the rule as administered 'inconsistent with law' and void. Although a law or rule be fair and just in appearance, yet if it is applied and administered by public authority with an evil eye and an oppressive hand, so as to deprive a person of his fundamental rights, it cannot be sustained. *Yick Wo* vs. *Hopkins,* 118 U. S. 356, 374, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Henderson* vs. *Mayor of New York,* 92 U. S. 259; 23 L. Ed. 543; *Chy Lung* vs. *Freeman,* 92 U. S. 275, 23 L. Ed. 550; *Ex parte Virginia,* 100 U. S. 339, 25 L. Ed. 676; *Neal* vs. *Delaware,* 103 U. S. 370, 26 L. Ed. 567; *Soon Hing* vs. *Crowley,* 113, U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145. One of the objects of this rule was to give, not to deprive, the alien of the benefit of counsel. The time when an alien, who is ordinarily ignorant of the law, of legal procedure, and of his

rights, may derive the most benefit of counsel is when he is arrested and his hearing begins. It would have been no abuse of the discretion of the inspector to have permitted the appellees to have counsel to advise them immediately upon their arrest, and to have permitted them and their counsel to inspect the warrant of arrest, to be present and to take part in the proceedings at and after the first stage of the examination and hearing of the aliens. Such a course would have been in accord with the fundamental principles of English and American jurisprudence consistent with the law, and it should have been pursued. The refusal of the inspection of the warrant of arrest and the refusal to permit the aliens to see and consult their counsel before, and to permit them to participate in the proceedings at, their examination directly tended to prevent a fair hearing upon the charges against them."

* * * * * *

In finally submitting this matter to the Court it is respectfully urged that the judgment of the lower Court should be reversed, for the reason herein set forth, and it is considered apt at this time to finally direct the attention of the Court to the language of Connor, District Judge, in the case of *Ex parte Lam Pui,* 217 Fed. 456 Supra, where the learned Judge states on page 465:

"Long, and frequently sad, experience teaches that when officers intrusted with the administra-

tion of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short and easily taken, step to do so when the liberty of the citizen is involved."

It is felt that the final judgment of this Court should be that this appellant should be discharged from custody, and that she go hence without day.

Respectfully submitted,

GEO. A. McGOWAN,
Attorney for Appellant.

Dated March 15th, 1917.